INDEX.

	Page.
Statement	1
Provisions of law involved	2
Analysis of conflicting decisions	5
The issue	13
Argument:	
I. Did the Circuit Court of Appeals err in the construction it placed upon the words "intent or effect" as used in the Act of May 9, 1902?	13
II. Did the Circuit Court of Appeals err in refusing to rule on the validity of Regulation No. 9?	16
III. Conceding that Regulation No. 9 is not a conclusive determination of what constitutes an abnormal moisture in butter, should the question of fact have been submitted to the jury?	20
Appendix	23

AUTHORITIES.

Cases:	
Buttfield v. *Stranahan*, 192 U. S. 470	6, 17
Cohen v. *Edwards*, 256 Fed. 964	10
Coopersville Cooperative Creamery Company. v. *Lemon*, 163 Fed. 145	5, 6, 7, 8, 9, 17, 18
Field v. *Clark*, 143 U. S. 649	6
Fong Yue Ting v. *United States*, 149 U. S. 698	17
In re Kollock, 165 U. S. 526	6
United States v. *Bailey*, 9 Pet. 238	17
United States v. *11,150 Pounds of Butter*, 195 Fed. 651	10, 11
Union Bridge Company v. *United States*, 204 U. S. 364	6, 17
Statutes:	
Act of August 2, 1886, 24 Stat. 209	2, 3, 16, 18
Act of May 9, 1902, 32 Stat. 193	2, 3, 4, 5, 13, 16, 18, 19
Revised Statutes, Section 251	3, 16
Revised Statutes, Section 3447	16
Regulations:	
Treasury Regulation No. 9, promulgated July, 1907	2, 4, 5, 10, 13, 16, 18, 19, 20, 21, 22
Bulletins:	
Bulletins number 39, Bureau of Animal Industry, Department of Agriculture	17, 23
Bulletin number 139, Bureau of Animal Industry, Department of Agriculture	17, 20
Bulletin number 149, Bureau of Animal Industry, Department of Agriculture	15, 29
Dictionaries:	
Webster New International (1919)	13
Funk & Wagnalls New Standard (1913)	13
Textbooks:	
Sutherland's Statutory Construction	14

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

MARGARET C. LYNCH, EXECUTRIX OF the last will and testament of E. J. Lynch, Collector of Internal Revenue, deceased, petitioner,
v.
TILDEN PRODUCE COMPANY, respondent.
No. 139.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The Tilden Produce Company, Respondent herein, is a corporation engaged in the manufacture and sale of creamery butter, having its principal place of business at St. Paul, Minnesota.

In August and September, 1918, it manufactured and shipped to the Chicago Cold Storage Company at Chicago, Illinois, a quantity of butter. One hundred and seventy-one samples of this butter were taken by Government agents. The tests by official chemists at the laboratory of the Bureau of Internal Revenue at Washington (the accuracy of which is

not disputed) showed an average moisture content of 16.76 per cent (R. 288–292). Regulation No. 9, issued by the Treasury Department pursuant to the Act of May 9, 1902, Chap. 748, 32 Stat. 193, provides that all butter holding 16 per cent or more of moisture is classed as adulterated butter. The tubs from which samples were taken showing 16 per cent or more of moisture content, amounting in all to 9,360 pounds of butter, were accordingly seized by the Collector of Internal Revenue, at Chicago, and on December 3, 1918, respondent was notified that stamp taxes on said butter in the sum of $936 were due (R. 271). December 11, 1918, respondent paid said taxes under protest. Claim for refund having been rejected (R. 272–275), action was instituted by the Tilden Produce Company to recover the amount of said taxes. The District Court for the District of Minnesota directed a verdict for the respondent (R. 271) and after the entry of judgment thereon petitioner obtained a writ of error.

The Circuit Court of Appeals for the Eighth Circuit affirmed the judgment (282 Fed. 54), and denied a petition for rehearing. A writ of certiorari brings the case here.

PROVISIONS OF LAW INVOLVED.

The provisions of law applicable in this case start with the Act of August 2, 1886, Chap. 840, 24 Stat. 209, known as the Oleomargarine Act, which defines butter, imposes a tax, and provides for the regulation, manufacture, and sale of certain dairy products.

On May 9, 1902, the present law was passed (Chap. 748, 32 Stat. 193), amending the Oleomargarine Act.

Section 4 of the new Act adopts the definition of butter contained in the old Act and gives various definitions of adulterated butter, one being:

> Any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk or cream. * * *

A tax of ten per cent per pound is levied upon adulterated butter when manufactured, sold, or removed for consumption.

Section 14 of the Act of 1886 incorporated in the Act of 1902 provides for chemists to assist the Commissioner of Internal Revenue in determining in contested cases what butter is to be taxed, and further states that his decision "in matters of taxation under this Act shall be final."

Section 20 of the Oleomargarine Act, by incorporation made a part of the Act of May 9, 1902, provides:

> That the Commissioner of Internal Revenue, with the approva' of the Secretary of the Treasury, may make all needful regulations for caring into effect this Act.

Section 251 of the Revised Statutes provides:

> The Secretary of the Treasury * * * shall prescribe * * * rules and regulations not inconsistent with the law to be used under and in the execution and enforcement of the various provisions of the Internal Rev-

> enue Laws * * *. He shall give such directions to collectors and prescribe such rules as * * * may be necessary for the proper execution of the law.

Section 4 of the Act of May 9, 1902, in so far as it purported to levy a tax and regulate the distribution of "such adulterated butter," classed in the Act as—

> Any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk or cream, * * *.

was not and could not be workable or enforceable, or of any uniform application, until it was determined at what point the moisture in the butter would constitute it adulterated, within the meaning of the Act, and until directions were given to Collectors prescribing the rules under which they should test butter and levy the tax. Accordingly, the Commissioner of Internal Revenue, with the approval of the Secretaries of the Treasury and Agriculture, did, in July, 1907, promulgate an interpretative regulation known as Regulation No. 9, as follows:

> The definition of adulterated butter as contained in the Act of May 9, 1902, embraces butter in the manufacture of which any process or material is used whereby the product is made to contain abnormal quantities of water, milk, or cream, but the normal content of moisture permissible is not fixed by the Act. This being the case it becomes necessary to adopt a standard for moisture in butter which

> shall in effect represent the normal quantity. It is, therefore, held that butter having sixteen per cent or more of moisture contains an abnormal quantity and is classed as adulterated butter * * *. Butter which has been renovated and has sixteen per cent or more of moisture will be held to contain abnormal quantities of water, milk, or cream and will, therefore, be classed as adulterated butter.

ANALYSIS OF CONFLICTING DECISIONS.

The first case in the Circuit Court of Appeals to pass upon this question arose in 1908 from the Sixth Circuit in *Coopersville Cooperative Creamery Company* v. *Lemon* (163 Fed. 145). The pertinent facts are as follows: The plaintiff in error was engaged in the manufacture of creamery butter. It did not profess to be engaged in making or selling adulterated butter, and so took out no license and paid no tax as the maker of such butter. On the contrary, it claimed it was making ordinary creamery butter and was not subject to regulations for tax imposed upon makers of adulterated butter. Two carloads of its butter were examined by Internal Revenue Agents and a large proportion found to contain an abnormal percentage of water. The butter was accordingly classified as adulterated, under the Act of 1902 and Regulation No. 9 made in pursuance thereof, and taxes and penalties aggregating $1,620 were assessed and paid under protest. Suit to recover this sum resulted in a directed verdict for the taxpayer.

The Circuit Court of Appeals first considered the power of Congress to delegate authority to the Commissioner of Internal Revenue to promulgate, with the approval of the Secretary of the Treasury, a regulation that butter containing 16 per cent or more of water, milk, or cream should be classified as adulterated butter under the Act, and on finding for such power expressed its conclusions, through Lurton, J., as follows, page 147:

> The contention that the delegation of authority to promulgate such a regulation is to delegate either legislative or judicial power to an executive officer is founded upon a misapprehension of the character of the authority delegated. That Congress can not delegate legislative authority or power to any executive official or board of officials is elementary. To do so would be destructive of our whole system and scheme of government. *Field* v. *Clark*, 143 U. S. 649, 691, 12 Sup. Ct. 495, 36 L. Ed. 294. That the delegation of authority to add to or take away from a law would be to delegate legislative power must also be conceded. But that Congress may enact a law and delegate the power of finding some fact or state of things upon which the operation of the law is made to depend is equally clear. *Field* v. *Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813; *Buttfield* v. *Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386, 27 Sup. Ct. 367, 51 L. Ed. 523. The authority

> to make all needful regulations not inconsistent with law is not a delegation of power to add something to an incomplete law nor a grant of judicial power. It is only an authority to determine the fact upon which the operation of the law is made to depend.

The next question considered by the court was whether the Act itself, either expressly or by necessary implication, authorized the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to promulgate such a regulation. After a careful examination it reached the conclusion that the statute by necessary implication gave such authority. To quote from the opinion (p. 150):

> While it must be conceded that none of the provisions of the butter act, nor of the general law in express terms, confers authority to determine the per cent of moisture in dairy butter *which shall constitute adulterated or taxable butter*, yet it is not easy to escape the conclusion in view of the general character of the law and of the broad language in which the power to make needful rules to carry the law into execution is conferred, that there is an implied power to determine the fact as to what is an undue, unusual, or, in the words of the act, an "abnormal" incorporation of moisture. An express power to make departmental regulations involving the determination of facts upon which the operation of a law is made to depend is not essential.

> That which is plainly implied is as much the law as that which is expressed in plain terms. For the practical operation of the law it was deemed necessary that the department charged with its execution should have authority to make regulations not inconsistent with law, and this power was accordingly conferred in general terms. The regulation in question is reasonable, is not inconsistent with law, and we see no sufficient ground for saying that it is not within the fair scope and purview of the authority conferred.

The next point considered was the effect of the regulation establishing the normal moisture content of butter, on which the court said (p. 150):

> The conclusiveness of the determination of the fact upon which this law is made to depend would seem to follow from the authority under which it was made. The fact is one which Congress might have determined for itself. Obviously, if it did, that would be an end of the matter, and all butter which contained the moisture content so fixed, or more, would have been subject to the tax. In referring the determination of the fact to the administrative officials it has equally manifested its intent that the standard of excessive water content should be, when so determined, as conclusive as if named in the law itself. If in fixing the standard the commissioner does not legislate by amending the law or altering it, nor act judicially by deciding a fact which was one which in its intrinsic nature required judicial determination, it is difficult to see, in the

> absence of fraud or bad faith, neither of which is here alleged, upon what theory a fact which Congress has submitted to his determination can be subject to review. The power of Congress to tax all butter, or only certain qualities of butter, is not disputable, and is only qualified by the requirement of geographical uniformity. Wishing to tax certain grades of butter only, it delegated to an administrative board the determination of the question of fact as to what was an abnormal moisture content, and made that fact so settled the line between taxable and nontaxable butter.

The trial court submitted to the jury the question of whether or not sixteen per cent of water was an abnormal amount, and in discussing this submission the appellate court pointed out that while it considered that the regulation has the force of law as a conclusive determination of the fact, yet whether or not it has such force it furnishes a working rule for the guidance of the officers and the information of manufacturers, and on the trial of an action by a manufacturer to recover taxes enacted on butter alleged to contain more than sixteen per cent of mositure, the submission of the question to the jury was not an error of which the plaintiff could complain.

The court finally said that assuming that no authority rested in the Commissioner to determine what is the normal percentage of water contained in butter and that the question of what is an abnormal percentage is one of fact to be determined in each

particular case, the Regulation is not invalid on that account.

The above case has been followed by other courts (see *Cohen* v. *Edwards, Collector*, 256 Fed. 964) and the Commissioner of Internal Revenue has operated uniformly thereunder and collected taxes in all the States without challenge, until the court in the instant case took a contrary view, thereby plunging the legal question and procedure thereunder into uncertainty. If the decision is allowed to stand it will leave the office of Internal Revenue in doubt as to whether Regulation No. 9 must be amended and considerable sums of money collected thereunder returned.

In the case at bar the Circuit Court of Appeals held:

> We find it unnecessary, in our view of the evidence, to determine whether Regulation No. 9 is valid or not, for the reason that, conceding it to be valid so far as creating a standard is concerned, there is no evidence in the record that the average moisture found in the butter got there by the intentional or effective use of a process or material by plaintiff which caused the butter to absorb such moisture.

The trial court refused to submit the case to a jury and the Circuit Court of Appeals justified an instructed verdict on the authority of *United States* v. *11,150 Pounds of Butter* (195 Fed. 657, Eighth Circuit). In that case the court held that the Government as Libellant had the burden of proving against the Milton Dairy Company "(1) that such a process

or such material was used in the manufacture or manipulation of the butter here in controversy; and (2) that it was used with the intent or the effect of causing the butter to absorb abnormal quantities of water, milk, or cream."

In the instant case, while admitting that respondent suing for the recovery of taxes was placed in the position of proving that it had not done the things that in an information on libel the Government must prove were done, nevertheless it was decided that respondent had proved the negative of such facts because it had not revealed any *intent* to violate the law. To quote from the opinion on this point:

> The plaintiff in this case had the burden of showing that it did not do the things which the court held in the case cited was necessary for the libellant to show that the Milton Dairy Company did, and we are of the opinion that such burden was fully met, as, after a careful reading of the evidence, we can not find any evidence that would be sufficient to sustain a verdict that a process or material was used by plaintiff in the manufacture or manipulation of the butter in question with intent or effect of causing such butter to absorb abnormal quantities of water, milk, or cream. The mere fact that an average of 16.76 per cent of moisture was found in the butter, standing alone, would not show a violation of the statute, as decided in the case above mentioned, in view of the fact that the process of making butter, speaking generally, consists in the elimination of

> moisture from cream or milk, which moisture averages in milk from 86½ per cent to 87 per cent and in cream is about 65 per cent.

The court interpreted the meaning of the words "intent or effect" used in the statute as practically synonymous, saying:

> The evidence shows that, after the butterfat is, by the process of churning, separated from the buttermilk, it is washed with water for the purpose of eliminating any buttermilk still in the butterfat. This is the universal practice, and as the evidence shows is necessary; but, if we concede the moisture found in the butter in question came from this source, there is no evidence that the plaintiff used the water with intent or effect to cause the butter to absorb an abnormal quantity of water. The law says that the process of material must be used with the intent or effect. We know the meaning of the word "intent," but the word "effect" following the word "intent," does not mean that if you find an abnormal quantity of moisture in butter you may assume without evidence that the manufacturer used a process or material with the intent or effect of causing the butter to absorb abnormal quantities of water, milk, or cream. Whatever is effected is the consequence of a specific design. It always requires, therefore, a rational agent to effect anything. So that the words "intent" and "effect," as used in the statute, mean practically the same thing.

THE ISSUE.

The principal issues presented by this case are:

1. Did the Circuit Court of Appeals correctly interpret the words "intent or effect" used in the Act of May 9, 1902, as meaning the same thing?

2. Did the Circuit Court of Appeals err in refusing to rule on the validity of Regulation No. 9?

3. Conceding that Regulation No. 9 is not a conclusive determination of what constitutes abnormal moisture in butter, should the question of fact have been submitted to the Jury?

ARGUMENT.

I.

Did the Circuit Court of Appeals err in the construction it placed upon the words "intent or effect" as used in the Act of May 9, 1902?

In this connection the Appellate Court said:

> Whatever is effected is the consequence of a specific design. It always requires, therefore, a rational agent to effect anything. So that the words "intent" and "effect" as used in the statute mean practically the same thing.

Both Funk and Wagnalls New Standard Dictionary (1913) and Webster's New International (1919) Dictionary define "effect" as meaning "*outcome.*" An example of its correct use is given in the phrase "effect of an explosion" which is not restricted to the result of any specific design. As a general rule, the words of a statute are to be taken in their ordinary

and popular sense (*Sutherland's Statutory Construction*, page 749). Since there is no apparent reason to the contrary, the ordinary meaning should be given here. There is no technical definition which would apply to the word "effect" and the fact that it follows "intent" and the two are joined by "or" indicates that the words are not to be used synonymously, for the conjunction "or" is commonly used to denote a contrast in thought between the words it joins.

The sources of the two words indicate different root meanings—"intent"—from the latin prefix *in*, meaning toward, and the verb *tendo* (stretch). The literal meaning being, therefore, stretch toward which Webster recognizes when he defines intent as "turning of the mind toward an object." While he gives as synonyms "design" and "purpose." Effect is derived from the latin word *efficio*—prefix by (out) and the verb *facio* (make or do). The literal meaning is found in "outcome" which Webster gives, with "consequence" as a synonym.

It was error for the appellate court to construe the word "effect" as necessarily proceeding from a rational agent. The mental element can be wholly lacking.

Congress in using these words obviously intended to cover two phases of operation in connection with the manufacture of adulterated butter, to wit: (*a*) Where the law is violated by intent or design, and (*b*) where the law is violated as a result of carelessness, ignorance, or greed. To eliminate this second

class of violation which Congress intended to cover by the use of the word effect would be to defeat the very purpose of the law which is to prevent deception and to insure that a buyer will get value for money spent.

It is common knowledge that when moisture in an article of food reaches a fixed percentage, it has a tendency to increase the weight of the article and create the condition which it was the prime purpose of the Act of 1902 to prevent. And when it is shown that butter offered for sale is found to contain 16 per cent or more of moisture, a greater moisture content than is by investigation of the Department of Agriculture, Dairy Division (see Bulletin 149, Bureau of Animal Industry, certain portions of which are printed in the appendix), found to be the average water content, this showing indicates that in the manufacture or manipulation of the butter some process or material is used with the intent or the effect of causing it to absorb an abnormal quantity of moisture. It is just as much a violation of the law for the butter maker to fail to manipulate the butter sufficiently after many washings and thereby leave an excessive moisture content in the product which he offers for sale as it is for him cunningly to devise and use a process to inject undue moisture into the butter.

Congress knew that a process or material is often used, either by intent or carelessness, with the effect of causing absorption of abnormal quantities of water, milk, or cream. Normal moisture can not be

66888—23——3

fixed at any unchangeable point, and therefore the usage or custom in the trade of the butter industry should fix the high water mark of moisture content.

It is common knowledge that an edible substance, such as butter, has a standard moisture content that renders it wholesome and palatable and, while an abnormal quantity of moisture does not render it entirely unsuitable for use as a food, yet inasmuch as it is an article bartered on the market and its cost to the consumer is fixed by weight, the Act of 1902 is all that keeps the unscrupulous or careless manufacturer of this article of food from adding to its weight by using methods in his butter making which cause absorption of abnormal quantities of moisture, thereby selling to an unsuspecting public an inferior article.

It is not the theory of the Act to prohibit or make it a crime to sell butter with an abnormal quantity of moisture which increases the weight, but it is the purpose to, and the Act does, levy a tax in such amount as to prevent any gain to a careless or greedy manufacturer who puts on the market a butter containing excess moisture.

II.

Did the Circuit Court of Appeals err in refusing to rule on the validity of Regulation No. 9?

Congress has delegated the power to make this Regulation by express enactment in the Act of May 9, 1902, the Act of August 2, 1886, and Revised Statutes, Secs. 251 and 3447. It is well established

that Congress can submit the decision of contested matters of fact, on the determination of which hinges the application of the law, to an administrative official, and Congress has the power to make such administrative official's decision thereon final. *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386.

In the absence of express delegation, that authority by necessary implication has been delegated. *United States* v. *Bailey*, 9 Peters 238; *Coopersville Cooperative Creamery Company* v. *Lemon*, 163 Fed. 145.

In declaring that 16 per cent of moisture in butter is an abnormal quantity, the Commissioner of Internal Revenue did no more than to state and establish a scientific fact concurred in by the Departments of Agriculture and Treasury (see Bulletin 39, printed in the appendix for the convenience of the court, Bureau of Animal Industry, Department of Agriculture, and Bulletin 139, Bureau of Animal Industry, Department of Agriculture).

When this regulation was in issue, the Circuit Court of Appeals for the Sixth Circuit, in *Coopersville Cooperative Creamery Company* v. *Lemon*, *supra*, said:

> The contention that the delegation of authority to promulgate such regulation is to delegate either legislative or judicial power to an executive officer is founded upon a misapprehension of the character of the authority delegated. * * * It is only an authority

> to determine the fact upon which the operation of the law is made to depend. Congress might have made the necessary tests and might have acquired the knowledge of the butter-making art to enable it to have enacted that adulterated butter should consist of butter having a moisture content of sixteen per cent or more, but that would have been an unnecessary detail. For it was undoubtedly competent to declare that butter which contained an abnormal quantity of water, milk, or cream should be classified as adulterated butter, and that the fact as to what was, in dairy butter, an abnormal proportion of water, milk, or cream should be determined by a regulation of the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

Finally Congress specifically provided that the Commissioner's finding on a question of fact on matters of taxation under the Adulterated Butter Act is final. Section 14 of the Act of 1886, which is incorporated in the Act of 1902, provides:

> And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this Act; and his decision in matters of taxation under this Act shall be final.

Although the Circuit Court of Appeals in the instant case states that "we find it unnecessary in our view of the evidence to determine whether Regulation No. 9 is valid or not," a reading of the opinion discloses that it is based upon an interpretation and

repudiation of Regulation No. 9. After setting forth the material portions of the Statute, Regulation No. 9 is quoted in the opinion and a paragraph devoted to pointing out that the Regulation attempts to construe the Act, and then the court concludes, "so far as the Regulation differs from the statute, we must of course follow the latter."

Practically all the remainder of the opinion is devoted to the alleged variance between the Regulation and the Statute. The court takes exception to the fact that the Commissioner of Internal Revenue, when referring in the Regulation to the Act of 1902 uses the expression that adulterated butter as defined in the statute includes butter in the manufacture of which any process or material is used whereby the "product is made to contain" abnormal quantities of water, milk, or cream.

The gist of the opinion is a rejection of Regulation No. 9 because it assumes that butter that has 16 per cent or more of moisture content is adulterated whether any intent to violate the law is disclosed or not.

The court's opinion, therefore, amounts to a repudiation of Regulation No. 9, in so far as it does not make it necessary to have the 16 per cent of moisture *intentionally* injected into the butter to make it adulterated.

We therefore maintain that although the opinion professes not to, in reality it does, rule in part on the validity of Regulation No. 9, and in so far as the

opinion is bottomed on a rejection of the Regulation and a differentiation between it and the Act, so far is the court in error.

III.

Conceding that Regulation No. 9 is not a conclusive determination of what constitutes an abnormal moisture in butter, should the question of fact have been submitted to the jury?

The evidence shows that the Regulation in question was known to the respondent at the time the butter was manufactured, although its employees appear either to have been careless in observing it or to have intentionally disregarded it. (See Record, pp. 16–25, 28–30, 39, 42–43, 49, 55, 66–67, 73–74, 81, 83–84, 86, 92, 99, 124, 152–153, 221.)

It is a notable fact that of the 171 samples of butter seized and tested for their moisture content (Defendant's Exhibit 3, 288–292), only 15 showed a moisture content within the standard established by Regulation No. 9. The remaining 156 samples were in excess of the standard and were labeled and above the average normal content of butter as determined by the tests conducted by chemists of the Departments of Agriculture and Treasury. These tests show a normal content ranging approximately between 11.75 per cent (Bulletin 139, Bureau of Animal Industry, pp. 135, 215, 250, 253) and 13.9 per cent (Bulletin 139, Bureau of Animal Industry, pp. 250–253).

It was also established on behalf of petitioner that after the promulgation of Regulation No. 9, manu-

facturers of butter, in order to meet competition in trade caused by the tactics of some manufacturers in increasing the moisture content of their product, endeavored so closely to approximate the standard fixed by Regulation No. 9 that they frequently exceeded it. (Record pp. 42–43, 67, 73–74, 81, 83–84, 94, 99, 125, 130, 134, 159, 162–168, 170, 173–178, 197–211, 213, 217, 220–224, 227–229, 233–235, 244–246, 248–249, 254–258, 259, 262.)

The burden was also on the respondent to establish by a preponderance of the evidence:

(1) That it was not a manufacturer of adulterated butter. It therefore should have shown what the normal moisture content of butter really is, in order to establish that its butter was not adulterated.

(2) That its butter did not carry an excess of such normal moisture;

(3) That it was not using any process or material with the intent or with the effect of causing its butter to absorb abnormal moisture; and

(4) That the butter upon which the tax was levied did not contain an abnormal quantity of moisture.

All this it failed to do. It did not challenge the accuracy of the tests by official chemists at the laboratory of the Commissioner of Internal Revenue of the samples of its butter taken, which tests formed the basis of the levy of the tax. This being true, it is conclusively shown that respondent did place on the market butter containing a moisture content in excess of 16 per cent.

The regulations of the Commissioner of Internal Revenue determined and classified as *prima facie* abnormal any quantity of moisture of 16 per cent or above and respondent has failed to disprove such *prima facie* showing.

The Circuit Court of Appeals therefore was in error in justifying an instructed verdict; in construing "intent" and "effect" synonymously; and in disregarding Regulation No. 9 as in conflict with the Act of 1902.

Respectfully submitted,

JAMES M. BECK,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

OCTOBER, 1923.

APPENDIX.

United States Department of Agriculture, Bureau of Animal Industry Circular No. 39, D. E. Salmon, D. V. M., Chief of Bureau, Dairy Division, No. 44.

THE WATER CONTENT OF CREAMERY BUTTER.

Since creamery butter—the product of the factory system—has become the leading grade in the markets of this country, a belief has arisen that it ordinarily holds an undue portion of water. And some have thought that the excess of water was increasing in creamery butter, even to the point of intentional "loading" in exceptional cases. When Great Britain and Germany recently established 16 per cent as the legal maximum for water in butter, it was alleged that the American creamery product would generally exceed this standard; and when, under the new law of Congress concerning "renovated butter," the regulations adopted the 16 per cent limit, manufacturers of this article claimed this to be unfair discrimination, because creamery butter might continue to run beyond this limit, intimating that such large moisture content was usual in the creamery product. No reliable basis existed for such allegations and suggestions, and it seemed desirable to ascertain the facts in this matter.

During the year 1902 the United States Department of Agriculture had opportunities which permitted sampling a large number of packages of creamery butter of known history and direct from the makers. Samples were taken from 730 different packages in all,

constituting what may be regarded as a thoroughly representative assortment of creamery butter made in this country. The butter was purchased by the Department for this purpose and other experimental uses. The packages were from 400 different creameries, located in 18 States, and scattered pretty well over the active dairying districts from Maine to California. Nearly half of the butter was made in August, a month when excessive moisture is often feared, and the remainder was produced about equally in the months of May, June, and September. The 800 samples thus taken and submitted to careful chemical tests gave the results shown by the accompanying table.

It is thus seen that the moisture content in the 802 samples examined ranged from 7.2 per cent to 17.6 per cent, with a general average of 11.78 per cent. Butter made in the four months named, considered separately, did not differ much in extremes or in averages. September gave the lowest average of water content and the least range. The averages by months were these: May, 11.81 per cent; June, 11.91 per cent; August, 11.79 per cent; and September, 11.59 per cent. There were only 3 samples found to contain less than 8 per cent of water, only 1 over 17 per cent, and only 8 over 16 per cent. Nearly seven-eighths of the 802 were between 10 and 14 per cent, and considerably more than half between 11 and 13 per cent.

Summary of water content in samples of creamery butter.

[Eight hundred samples from 400 creameries in 18 States of the United States, taken in 1902.]

Month in which the butter was made.	No. of tubs sampled.	No. of States represented.	No. of samples analyzed.	Water content.			Classification of samples by water content.									
				Highest.	Lowest.	Average.	Below 8 per cent.	8 to 9 per cent.	9 to 10 per cent.	10 to 11 per cent.	11 to 12 per cent.	12 to 13 per cent.	13 to 14 per cent.	14 to 15 per cent.	15 to 16 per cent.	Above 16 per cent.
				Per cent.	*Per cent.*	*Per cent.*	*No.*	*No.*	*No.*	*No.*	*No.*	*No.*	*No.*	*No.*	*No.*	*No.*
May	122	18	160	16.40	7.20	11.81	1	4	9	25	58	30	22	9	1	1
June	119	18	119	17.62	8.19	11.91	0	4	11	15	35	32	10	5	4	3
August	377	17	377	16.89	7.23	11.79	2	8	25	61	126	86	47	16	2	4
September	112	18	146	15.28	8.30	11.59	0	1	10	23	48	30	26	6	2	0
Totals	730	18	802	17.62	7.20	11.78	3	17	55	124	267	178	105	36	9	8

This is regarded as an unexpectedly good showing for such a large number of typical lots of creamery butter. Great care was taken in the sampling, the treatment of the samples, and the work of making the moisture determinations, with painstaking cross tests for verification at different points, so that the results are deemed reliable. A considerable number of samples (not shown by the table) were rejected because of accidents and manifest faults, and several records of determinations made were also omitted for like reasons. Yet perfection is not claimed, and if error exists at all it is doubtless in giving figures for water content rather below the actual facts than above them. The samples were all taken from tubs smaller than usual in commerce, holding 20 pounds each instead of 60. It is barely possible that the butter thus packed would lose a little more of its moisture than in larger packages, and yet experimental comparisons fail to support this suggestion. On the whole, this series of trials, the most extensive on record in this country, seems to justify the statements that during the greatest producing half of the year American creamery butter has an average water content not exceeding 12 per cent. This fact ought to be satisfactory to producers and reassuring to purchasers and consumers.

Several interesting items have been derived from the records incidental to the work described. All of this butter was examined by an expert judge and scored or marked for quality on a scale of points, about the time the samples were taken for examination. All packages marked 95 points or over were considered exceptionally fine, and all marked 85 or lower were the poorest lots, although very fair butter.

Twenty samples of butter, taken from one tub in each of the four months from the five creameries averaging the highest scores, all above 95 points, had an average water content for the lot of 11.03 per cent; the best of all, 11.53 per cent. These five creameries were in Minnesota and Wisconsin. Five of the poorest lots taken for comparison gave an average 10.6 per cent of water. These were from four other States.

The samples with exceptionally low water content were from butter made in August, May, and June; the highest, in June and August. The very lowest was May butter, and the very highest June butter.

In the September butter the scorer, an experienced and most competent judge, marked eight tubs as showing too much moisture (commercially). Samples from these averaged 12.67 per cent of water. Two packages marked "full of water" had 10.77 and 11.45 per cent (average 11.11), and two marked "worked too dry" had 11.25 and 13.30 per cent (average 12.27). These results show the impossibility of forming an accurate opinion as to actual water content of butter from its appearance alone, even when closely examined by a keen observer.

By way of comparison, the following data are quoted as among the most reliable which are available:

Canadian butter.—During the months of July and August, 1902, officials of the Canadian Department of Agriculture collected samples from 105 lots of creamery butter, representing the product of five different Provinces of the Dominion. The water content of these was determined, with the following results: Minimum, 7.94 per cent; maximum, 16.77

per cent; average of 105 samples, 12.31 per cent. These were classified thus:

Between 7 and 8 per cent	1 lot.
Between 8 and 9 per cent	1 lot.
Between 9 and 10 per cent	4 lots.
Between 10 and 11 per cent	15 lots.
Between 11 and 12 per cent	24 lots.
Between 12 and 13 per cent	23 lots.
Between 13 and 14 per cent	24 lots.
Between 14 and 15 per cent	10 lots.
Between 15 and 16 per cent	2 lots.
Between 16 and 17 per cent	1 lot.
Total lots	105

Danish butter (from official reports of butter on the English markets).—2,001 summer samples, 14.03 per cent; 1,930 winter samples, 14.41 per cent; average of 8,314 samples, 13.97 per cent of water.

Swedish creameries.—8,340 samples, 13.57 per cent of water.

American creamery butter (selected from experimental exports by United States Department of Agriculture, 1897–99).—64 samples, average 11.03 per cent.

All countries (B. Martiny).—17,332 samples, average 13.55 per cent of water.

The inquiry into the water content of creamery butter, as above described, was conducted during the year 1902 under the supervision of the Dairy Division, Bureau of Animal Industry. The analytical work was mainly done by the Dairy Laboratory of the Bureau of Chemistry.

HENRY E. ALVORD,
Chief of Dairy Division.

Approved:
JAMES WILSON,
Secretary of Agriculture.
WASHINGTON, D. C., *February, 1903.*

EXTRACTS FROM UNITED STATES DEPARTMENT OF AGRICULTURE, BUREAU OF ANIMAL INDUSTRY, BULLETIN 149, ENTITLED "THE NORMAL COMPOSITION OF AMERICAN CREAMERY BUTTER."

In an analysis of butter purchased on the New York market in 1907 there was found to be an average of 13.72 per cent of water (p. 8).

In 224 samples of butter there was an average of 12.87 per cent of water.—Iowa Experiment Station Bulletin 80 (p. 8).

AREA COVERED.

The area covered in this investigation embraces 14 States, namely, California, Iowa, Kansas, Maine, Michigan, Minnesota, Montana, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, and Wisconsin. The samples were taken during a period of one year from 488 creameries, and the total number which reached the laboratory in good condition for analysis was 695.

METHOD OF SAMPLING.

The samples in all cases were collected by Federal and State officials who appreciated the necessity of proper sampling. The following instructions were given each official:

The samples may be taken with a trier or by stripping a tub and cutting a V-shaped wedge from top to bottom of tub. The sample should be large enough to about fill the can. A sharp knife is satisfactory for cutting out the butter, which may be put into the can piece by piece until the can is about full. The cover should be pressed on tight, the can placed in the mailing tube, and mailed to the Diary Division.

Be sure to note the number on sticker pasted on the can and mark the same number on the detailed report of manufacture. These should be filled out for one day as fully as possible and returned to us. This work may have an important value on the future standard for butterfat in butter, and we request caution in every particular. If the sample of butter is not taken from the tub, it may be taken from the churn after the butter is worked and ready to pack. The surface of the butter should be stroked with a ladle to remove free moisture appearing on the surface and then take about 10 samples from different parts of the churn, which put directly into the can. If the sample is to be taken from the print, cut off from one end enough to fill can.

The samples were placed in half-pound friction-top cans, which were inclosed in mailing tubes and sent to Washington. With the exception of a few, which were discarded, the samples were received in good condition.

A number of samples were taken from the creameries making and packing butter for the United States Navy. These are considered separately, since the butter was made under contract specifying the quantity of salt and water permitted (pp. 8 and 9).

RESULTS OF THE ANALYSES.

A general table, which contains the original data of all the samples having practically complete churn records, is shown as Table I of the Appendix at the end of this paper. This table gives the samples by number, with the chemical composition and churning record of each. The following 30 tables have been constructed from the original data to facilitate study and show some of the comparisons that may be made.

Tables 1 to 12, inclusive, show averages of all samples in the aggregate. Tables 13 to 24, inclusive, have been compiled to show the average composition of butter from those States where the bulk of the samples originated. Tables 25 to 28, inclusive, give the chemical composition and churning record of those samples showing extremes in the various constituents. Tables 29 and 30 record the analyses of 34 samples of Navy butter.

GENERAL AVERAGES.

The first series of tables, Nos. 1 to 12, show the average composition of all the samples, the average composition by classes, seasons, and size of granules; the temperature of churning and of wash water by seasons; the test of buttermilk by seasons; the relation between the fat and moisture contents; and various phases of the churning conditions (p. 10).

In Table No. 1, entitled "Average composition of all samples used in the investigation," there was found 13.90 per cent of water (p. 10).

In Table No. 2, entitled "Average composition of the butter by classes," in Class 1 there was found 12.45 per cent of water; in Class 2, 15.32 per cent of water; and in Class 3, 13.85 per cent of water (p. 11).

In Table No. 3, entitled "Average composition of the butter according to seasons in which samples were taken," an analysis indicates that during the months of January, February, and March there was an average of 13.94 per cent of water; April, May, and June, 13.67 per cent of water; July, August, and September, 14.04 per cent of water; and for the months of October, November, and December, 13.81 per cent of water (p. 11).

In Table No. 4, entitled "Average composition of the butter according to size of granules when churning was completed," in the small size of granules there was found an average of 13.66 per cent of water; medium-size granules, 13.93 per cent of water; and in the large size 14.20 per cent of water (p. 11).

In an analysis of 223 samples from the State of Minnesota there was found an average of 13.60 per cent of water (p. 13).

In an analysis of 117 samples from the State of Wisconsin there was found an average of 13.77 per cent of water (p. 14).

In an analysis of 131 samples from the State of Iowa there was found an average of 14.24 per cent of water (p. 15).

In an analysis of 95 samples from the State of California there was found an average of 14.19 per cent of water (p. 15).

In an analysis of 37 samples from the State of Pennsylvania there was found an average of 13.53 per cent of water (p. 16).

In an analysis of 17 samples from the State of North Dakota there was found an average of 13.63 per cent of water (p. 16).

In an analysis of 15 samples from the State of Texas there was found an average of 13.98 per cent of water (p. 16).

In an analysis of 10 samples from the State of Michigan there was found an average of 14.44 per cent of water (p. 16).

In an analysis of 34 samples of Navy butter there was found an average of 12.21 per cent of water (p. 21).

On pages 22, 23, 24, 25, 26, 27, 28, 29, and 30 of Bulletin No. 149 is a detailed analysis of samples of American creamery butter. The lowest per cent of moisture disclosed from these analyses is 10.13, the highest being 20.65. The general average runs between 11 and 14 per cent of moisture.

In Table No. 2 of the aforementioned bulletin there is a detailed analysis of Navy butter (p. 31). The lowest per cent of moisture in this table is 11.19, while the highest is 13.09 per cent.

○